

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRIC JAMES SIMPSON,

Defendant-Appellant.

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UNPUBLISHED

June 26, 2014

No. 315777

Macomb Circuit Court

LC No. 2012-001742-FH

Before: O`CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of surveilling an unclothed person (second offense), MCL 750.539j(2)(a)(ii), and defrauding an innkeeper, MCL 750.292. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to 5 to 10 years imprisonment for his conviction under MCL 750.539j and 90 days in jail for the defrauding an innkeeper conviction. We affirm.

Defendant contends that there was insufficient evidence to support his conviction of surveilling an unclothed person. We disagree.

In defendant's statement of the question presented he also contends that there was insufficient evidence to support his conviction of defrauding an innkeeper, MCL 750.292. But in the content of his argument, defendant only challenges his conviction of surveilling an unclothed individual.

We review a claim of insufficient evidence by considering the evidence de novo in the light most favorable to the prosecution. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). We must determine whether a rational trier of fact could have found all essential elements of the crime to have been proved beyond a reasonable doubt. *Id.* We conduct our review with deference by making all reasonable inferences and resolving credibility conflicts in favor of the jury verdict. *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003).

Defendant does not contend that the evidence presented at trial was insufficient to convict *someone* of surveilling an unclothed person; rather, defendant contends that the prosecution presented insufficient evidence of the perpetrator's identity. See *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008) ("it is well settled that identity is an element of every offense"). We disagree.

At trial, Susan Watts testified that she was certain that defendant was the man who peered over the top of the bathroom stall at her while she used the restroom. We will not interfere with the jury in determining the weight of the evidence or the credibility of witnesses. *Gonzalez*, 468 Mich at 640-641; *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Defendant tries to argue that this identification is insufficient to convict him because Watts was unable to identify defendant from a small photograph shown to her by the police hours after the crime occurred. But this fact goes to Watts's credibility, which is for the jury to resolve. *Id.* Furthermore, evidence presented at trial showed that defendant was seated at the bar near the restroom. Also, Watts described the man who surveilled her as wearing a black baseball cap and a yellow shirt, which was exactly what defendant was wearing. Viewed in the light most favorable to the prosecution, this evidence supported defendant's conviction.

Second, defendant contends prosecutorial misconduct denied him a fair trial. We disagree because defendant has waived review of this alleged error.

Defendant argues that the prosecutor improperly attempted to bolster Watts's credibility. At trial, defense counsel and the prosecutor stipulated that Detective Babbitt "is going to read a line from the report, from Deputy Borbula's report." Defense counsel explained to the court that because "Officer Borbula is not available, we have agreed to take - - a critical line from the report will be read in the record." After this exchange, Babbitt read a line from Borbula's report: "[Watts] could not identify Cedric because she only saw his eyes and baseball cap." Defendant has waived alleged error regarding the admission of this evidence or the prosecutor's conduct. Error requiring reversal cannot be error to which the aggrieved party has contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).<sup>1</sup>

Next, defendant contends that defense trial counsel was ineffective for stipulating to out-of-court statements Borbula made and which were testified to by Babbitt. We disagree. Because defendant never moved for a new trial or sought to make a separate record factually supporting his claims, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Defendant's contention that defense counsel's stipulation to the introduction of a line from Borbula's report constituted ineffective assistance is without merit. To establish a claim of ineffective assistance of counsel a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

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<sup>1</sup> Defendant also argues that the introduction of Borbula's statement violated the Confrontation Clause. Defendant does not present this claim in his statement of the questions presented; therefore, it is not properly before this Court. See *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008). Furthermore, it is clear that the evidence was admitted as part of a defense strategy and that defendant through counsel waived his confrontation rights. See *People v Buie*, 491 Mich 294, 310, 315; 817 NW2d 33 (2012) ("the right of confrontation may be waived, and that the waiver may be effected by counsel, as long as counsel's decision constitutes reasonable trial strategy and the defendant does not object to the waiver").

*Meissner*, 294 Mich App at 459; *Snider*, 239 Mich App at 423-424. Defendant must overcome a strong presumption that counsel's performance was sound trial strategy. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). "We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *Id.*

Defendant fails to satisfy either prong of a claim of ineffective assistance of counsel: (1) the record shows that counsel's action was clearly strategic, and (2) nothing about the introduction of Borbula's statement prejudiced defendant. In fact, Borbula's statement, that Babbitt read, *bolstered* defendant's case by attacking the credibility of Watts' identification of him as the perpetrator. Defendant's argument on appeal does not overcome the strong presumption that counsel's performance constituted sound trial strategy. *Id.*

Finally, defendant argues that the trial court abused its discretion by departing upward from the recommended minimum sentencing guidelines range. We disagree.

Multiple standards of review apply to a sentence imposed pursuant to the sentencing guidelines. In general, the trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Whether the properly determined facts support a particular score presents a question of statutory interpretation, which is subject to review de novo. *Id.*

After the guidelines are properly scored, a court must impose a minimum sentence in accordance with the appropriate sentence range. MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). But a trial court may depart from the recommended sentencing guidelines range if it determines that there is a substantial and compelling reason to do so, and it states on the record the reasons for its departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). Appellate review of a trial court's guidelines departure consists of reviewing the trial court's determination that a particular factor exists for clear error, reviewing de novo as a matter of law whether that factor is objective and verifiable, and reviewing for an abuse of discretion the trial court's determination that the factor constitutes a substantial and compelling reason to depart. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). The extent of the particular departure is also reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*, citing *Babcock*, 469 Mich at 269.

In this case, defendant does not dispute that the trial court properly scored the guidelines, which recommended a minimum sentence range of 10 to 34 months. Defendant argues that the trial court abused its discretion by determining a substantial and compelling reason justified an upward departure and also abused its discretion by imposing a minimum sentence of 60 months in prison that was not proportionate to the offense and the offender.

A reason to depart from the guidelines must be substantial and compelling, which means that it "must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *Smith*, 482 Mich at 299. To be "objective and verifiable," a factor must be external to the minds of those involved and capable of being

confirmed. *Id.* at 301; *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). And the departure cannot be based “on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b).

In this case, the trial court determined that defendant’s very extensive criminal history of similar crimes, and defendant’s patently uncontrollable impulses, except perhaps by medications, provided substantial and compelling reasons for the sentence the court imposed. Our review of the record convinces us that the trial court’s stated reasons for departure are objective and verifiable and of considerable worth for determining the length of defendant’s sentence. First, defendant has an extensive criminal history of sexual, assaultive, and deviant offenses such as the instant offense. Second, defendant acknowledged the accuracy of the presentence investigation report in which the author reported that defendant admitted that unless he were in structured therapy, he could not control his sexual impulses and to act out in violation of the law. Third, a therapist’s report in the record states that defendant admitted committing offenses like the instant offense without getting caught between 200 and 300 times. Defendant did not dispute this at sentencing, but rather he apologized to “all victims over the past 20 years that I have harmed.” Considering these facts, we conclude that the trial court did not abuse its discretion by finding defendant’s extensive criminal history was a substantial and compelling reason justifying departure.

Defendant also argues that the extent of the departure rendered his sentence disproportionate. “For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant’s conduct and prior criminal history.” *Smith*, 482 Mich at 300. In this case, defendant’s extensive criminal activity was not adequately accounted for by the guidelines. MCL 769.34(3)(b). Furthermore, although the instant crime is only a class E public order offense, the trial court heard the victim testify regarding the significant impact that the crime had on her. In light of defendant’s extensive criminal history and the impact of defendant’s offense in this case, the trial court did not abuse its discretion. The minimum sentence the trial court imposed is within the range of principled outcomes. *Smith*, 482 Mich at 300.

We affirm.

/s/ Peter D. O’Connell  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey